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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1122~~ 922

THE CITIZENS BANK AND TRUST COMPANY OF BLOOMINGTON, INDIANA, Administrator d.b.n. of the Estate of Joseph Kelly Kerr, deceased, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The above named petitioner respectfully prays this Honorable Court for issue of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, Circuit, (called hereinafter the Court of Appeals), entered on December 20, 1956, that affirmed, upon the sole ground that the complaint below fails to state a claim upon which relief can be granted, the previous judgment-order of

the United States District Court of the District of Columbia, (called hereinafter the District Court), that dismissed said complaint for failure to state a claim on which relief can be granted, on the different ground of limitations.

CITATION TO OPINION BELOW

The District Court rendered no opinion. The opinions of the Court of Appeals, (*per curiam* and concurrence), (R. 7-11, and printed in Appendix B hereto), are presently reported officially in 85 Washington Law Reporter, (Advance Sheets), 527 and will later be reported officially in F.-2d, .

JURISDICTION

On December 20, 1956, the Court of Appeals entered its order in affirmance, (R. 12), of the judgment-order of the District Court, in dismissal of the complaint below, and, on February 25, 1957, (R. 22-23), denied the timely petition for rehearing of petitioner.

On May 12, 1957, within the statutory time for filing the present petition, which began to run from February 25, 1957, the Honorable Chief Justice received and granted *ex parte* application of petitioner for extension of said time, and by order of said date caused said time to be extended to and inclusive of June 25, 1957.

The jurisdiction herein is invoked under 28 USC, section 1254 (1).

THE QUESTION PRESENTED

Whether the complaint below, (R. 1-4), states a claim on which relief can be granted as responsive to its prayer to the District Court for general and special relief necessary to the statutory administrative and ministerial payment, due to petitioner on March 7,

1943, of the principal balance of $7404.75 of the final judgment of the District Court, in the prior action between the parties, for the recovery of $8227.50 from the United States by petitioner, which judgment balance is wrongfully withheld from and refused to petitioner, although duly appropriated by Congress and although neither petitioner nor its fiduciary estate, is or was ever indebted in any manner to the United States.

STATUTES AND RULES INVOLVED

The statutory provisions involved are contained in sections 16 and 19 of the War Risk Insurance Act, as amended, Act of June 7, 1924, ch. 320, Title I, 16 and 19, being 43 USC, 612 and 445; also act of June 25, 1948, C 646, 62 St. 974, being 28 USC, 2414; also Act of March 3, 1933, c. 212, Title 2, Sec. 13, 47 St. 1516, being 31 USC 227. The Federal Rules of Civil Procedure involved are, Nos. 1, 8f and 81(6b). Each item of the above is printed in Appendix A, infra, pp.

STATEMENT

On June 30, 1942, in the prior action between the parties, in which the United States consented to be sued and appropriated money to satisfy administratively the final judgment therein, and pursuant to mandate of this Court, the District Court entered its judgment against the United States for the recovery of $8227.50, forthwith payable, as one-tenth of same, ($822.75), as attorney fee to the attorney for petitioner, the plaintiff in said action, and, as the balance, ($7404.75), to petitioner. On March 7, 1943, when said litigation had finally terminated, pursuant to certification of the Attorney General, (28 USC, 2414 Supp. A), said judgment became final for statutory administrative ministerial payment and satisfaction, involving its transfer from the Department of Justice to

the Veterans Administrator, who thereupon affixed his voucher for its payment from the military and naval insurance appropriation subject to be so awarded by him, (38 USC 442, Supp. A), and so passed the judgment for preaudit, (31 USC 227, Supp. A), by the General Accounting Office, and payment by the Comptroller General. The preaudit involves ministerial acts of the Comptroller General if the records of the General Accounting Office disclose an existing indebtedness in any manner of the judgment-creditor to the United States. In such case, the Comptroller General withholds payment and seeks consent of the judgment creditor to satisfaction of such indebtedness from the judgment proceeds, or, if same is refused, withholds proceeds enough to satisfy the indebtedness and expense of promptly reducing same to final judgment in favor of the United States to be thereupon available as setoff against the original judgment. Any excess of the original judgment over the withholding is forthwith payable, and any subsequent excess of the withholding over the adjudged liability of the judgment-creditor for the indebtedness, is thereupon payable, with accrued interest, to the judgment creditor. The records in the prior action disclose the statutory administrative ministerial payment of $822.75, for account of said judgment and its provisions, but do not disclose the payment or other disposal of the appropriated judgment balance of $7404.75, wrongfully withheld from petitioner although neither petitioner nor its fiduciary estate is or was ever indebted in any manner to the United States.

On March 8, 1955, the District Court entered its order in dismissal of the complaint of petitioner, and on March 30, 1955, its further order in denial of rehearing to petitioner, whereupon petitioner appealed to the Court of Appeals on the grounds that the dismissal of the Complaint was material error, when

made upon motion instead of affirmative plea, and, made on the ground that the disclosure in the complaint of the lapse of more than 12 years, between June 30, 1942, the date of entry of the prior judgment, and December 4, 1954, the date of filing of the complaint of petitioner, barred the prosecution of the complaint, under the provision of the District Statute of Limitations, (D.C. Code, 16, 101-2), that a judgment of a District Court for the recovery of money shall be good and enforceable by an execution issued thereon, for the term of 12 years only from the date when an execution might first be issued thereon, which statutory construction disregards that 12 years had not elapsed from March 7, 1943, when the prior judgment was deemed final for the provided statutory administrative ministerial payment of same, and December 4, 1954, when the complaint below was filed by petitioner.

The *per curiam* opinion of the Court of Appeals briefly disposes of the appeal of petitioner, summarized therein as involving:

> . . . the dismissal of its suit against the United States . . . based upon a judgment entered in appellee's, (sic), favor . . . upon the original cause of action . . . on a policy of War Risk insurance. See *Citizens Loan Co.* v. *United States,* 316 U.S. 209, (1942).

After expressly putting aside:

> . . . various contentions . . . made before us chiefly concerning the statute of limitations . . . whether the statute making fund available for payment on insurance claims, 38 USC 442, evidences Congressional intention to allow the instant suit . . . .

the *per curiam* then further proceeds:

> We need not, however, decide whether an appropriation in advance of a judgment, constitutes consent to a later suit upon that judgment, for in any event, this suit was properly dismissed for failure to state a claim on which relief could be granted. Petitioner seeks nothing more than a reaffirmation of his first judgment. In this respect, the case is similar, to *Hetfield* v. *United States*, 78 Ct. Cls. 419, 422-23, (1933). There the action was dismissed because there had been no appropriation and because plaintiff put no question in issue other than that concluded by the prior judgment. In appropriate cases, of course, mandamus may lie against Government officials to compel performance of their duty to honor a judgment of the present sort. But this suit is not brought in mandamus. It is a suit against the United States in which no issue not already litigated has been raised. That being so, we affirm the judgment of the District Court, but solely on the ground we have stated. *Jones* v. *United States*, 97 U.S. App. D.C. 81, 228 F.2d 52, (1955), and do not reach the other points of the case.

The concurring opinion of Judge Danaher, the third member of the panel, states the Court did not reach the other questions because of complete agreement in the per curiam opinion, and comments whether petitioner might have proceeded differently below as possibly for mandatory relief.

The affirmance of the prior dismissal of the complaint and denials of petition for rehearing, are stated above.

Good reasons are believed to justify review of the *per curiam* decision herein that the original judgment

is *res adjudicata* and thus bars subsequent demand for wrongful withholding of the appropriated moneys provided for payment of the prior judgment.

REASONS FOR GRANTING THE WRIT

I. This Court has recognized its grant of the writ of certiorari is proper for examination into and resolution of the conflict of a decision of a Court of Appeals with a decision of the same issue by the Court of Claims of the United States, or by another Court of Appeals, and, of course, with a decision of this Supreme Court

Helvering v. *Intermountain Life Insurance Co.*, 291 U.S. 686, 689; *United States* v. *Jefferson Electric Mfg. Co.*, 291 U.S. 386, 392-95; and *United States* v. *Standard Rice Co.*, 323 U.S. 106, are decisions in which certiorari was granted to resolve conflict with decisions of the Court of Claims, and hence are good reasons for grant of the writ herein.

The denial of relief to petitioner by the exercise of jurisdiction in the determination of the Court of Appeals that the complaint does not state a ground for relief is dismissal of the case upon its merits and not for want of jurisdiction. (*Bell* v. *Hood*, 327 U.S. 678, 682).

Benedict v. *United States*, (1928), 66 Ct. Cls. 437, (Green, J., writing), a case substantially identical with the present case, grants judgment against the United States in the amount of the unpaid balance of a prior final judgment, for the recovery of money from the United States, entered in a District Court in the State of New York, being recovery of wrongful withholding of duly appropriated moneys necessary to pay and satisfy the original judgment by administrative ministerial payment of same to the judgment creditor. The judgments of the District Court below and of said District Court in New York are alike in that the judgment below for petitioner was entered

pursuant to a mandate of this Court, and the New York judgment was affirmed by the Court of Appeals and by this Court.

The *Benedict* opinion notes its judgment for the amount of the wrongful withholding allows no more than the original judgment allowed, and, because of jurisdictional limitations pertinent to the Court of Claims, might not allow as much as the New York District Court might allow in recovery of the wrongful withholding.

It is plain that the denial herein by the Court of Appeals of recovery of the withholding of $7404.75 of the original judgment conflicts with the decision of the Court of Claims in the *Benedict* case, in as much as petitioner would recover in the Court of Claims upon its claim to the wrongful withholding. The *Benedict* opinion emphasizes the conflict in its recital and explanation of its precedents granting judgment in recovery of wrongful withholding of appropriated moneys due to be paid in satisfaction of final judgments for money against the United States. In *United States* v. *O'Grady*, 22 Wall. (89 U.S.) 641 affirming 8 Ct. Cls. 451, and in *United States* v. *Weld*, 127 U.S. 51 affirming 23 Ct. Cls. 126, this Court has upheld the grant of judgment against the United States for recovery of wrongful withholding of appropriated moneys duly payable to satisfy a final judgment for the recovery of money from the United States.

It is plain such later judgment for recovery of wrongful withholding has reference to moneys previously appropriated to satisfy the prior judgment and hence, in the Court of Claims, is a judgment entered because there is a prior appropriation, meaning there is no distinction in the Court of Claims between appropriation prior to or subsequent to its judgment.

Lastly, it is plain that administrative ministerial payment of the later judgment for the withholding will quickly and completely pay and satisfy the original judgment to the extent it remained unsatisfied because of the wrongful withholding.

Grant of the writ, because of conflict of decision necessary to be resolved, is submitted proper.

II. The present case involves important questions about federal laws

The claim of petitioner herein against the United States is different from the claim in the original action in which the prior judgment was entered, (*Milwaukee County* v. *White Co.*, 296 U.S. 268, 275); and, as made in the District Court upon and related to its judgment in the original action, the claim of petitioner is ancillary to said original action, and is not an original action. The parties are deemed still in court for the purpose of giving effect to the judgment. (*Walden* v. *Craig*, 14 Pet. 147).

The claim of petitioner against the United States is based upon laws of the United States, as upon the prior judgment, and as for recovery of federal appropriated moneys wrongfully withheld from payment upon said judgment. (*Provident S. L. Assurance Soc.* v. *Ford*, 114 U.S. 635, 642; *Benedict* v. *United States*, *supra*).

Intimations in the *per curiam* and concurring opinions that a judgment creditor should proceed by mandamus against Government officials to compel performance of their duty to honor the judgment, instead of against the United States upon the judgment, are not in accord with the basic principle that he who brings suit is master to decide what law he will rely upon, and does determine by his complaint

whether he will bring suit as arising under the Constitution or the federal laws of the United States: (*The Fair* v. *Kohler Die & Specialty Co.*, 288 U.S. 22, 25):

In *Edgeport S. S. Co.* v. *United States*, 131 Ct. Cls. 210, 130 F. Supp. 333, the Court of Claims rejects contention of the United States that the pre-audit statute, (31 USC 227, Supp. A 2a), confines the claimant to the remedy of mandamus because a proceeding upon the judgment frustrates the purposes of the statute. The opinion after reciting the *Benedict* decision and other precedents Claimant recovery upon the judgment as the claimant procedure, proceeds:

> This section (31 USC 227) authorizes the Comptroller General to withhold from a final judgment any amount which he thinks the plaintiff may owe the defendant, but having done so the obligation is imposed upon him of instituting suit on the claim immediately, "if such debt is not already in suit". Congress did not mean for the Comptroller General to withhold payment of a judgment upon his own *ipse dixit*; . . . The objective was the judicial determination; it made no difference whether plaintiff or defendant initiated the action to secure the determination. . . . The initiative should not be taken from plaintiff; it has been awarded judgment. Congress has appropriated money to pay it; plaintiff should be permitted to enforce payment in any lawful manner it desires. We do not discern any intention on the part of Congress to prevent it from doing so.

III. The per curiam prevents simple and final disposal of the claim of petitioner to the wrongful withholding of the appropriated proceeds of the final judgment in the original action

The procedure, under 31 USC, 227, *supra*, for final settlement between the parties of all existing indebtedness of either to the other, if the parties are not in mutual agreement about settlement in performance of a final judgment for the recovery of money from the United States is simply the reduction of each claim of indebtedness to a final judgment for the recovery of money, with the judgments thereupon set off against each other.

Such composure of conflicting claims, if any, between the United States and petitioner does not appear herein. The forthwith ministerial administrative payment of the judgment balance of $7404.75, to petitioner, does not appear, and the indebtedness of petitioner, or of its fiduciary estate, to the United States, does not appear, which is necessary to proper withholding of forthwith payment of the judgment proceeds to petitioner. The concurring opinion considers the final judgment in the original action as "valid but dormant."

Petitioner complaint, in the same District Court, for relief, from the wrongful withholding of payment of the judgment balance of $7404.75 of the original judgment, by entry of a new judgment against the United States for petitioner recovery of $7404.75, rests upon the following settled precedent:

> We all know that when a judgment is recovered, it constitutes a new cause of action; on which there are three remedies, one, an execution, another, a writ of scire facias where execution is

delayed, *which results in a new judgment,* and third, an action of debt, which also results in a new judgment.— (Italics inserted for emphasis.)

Waddell v. *Cubell,* 21 D.C. 597, 600.

The writ of *scire facias quaere executio non* is defined to be a writ issued out of the court wherein a judgment has been entered, reciting said judgment, suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reasons, if any, why execution should not issue. Bingham, executions & Judgments, 123; Free. Executions, Sec. 81.—

Brown v. *Wygant,* 163 U.S. 618, 623.

Scire facias on a judgment is an ancillary proceeding, being merely a continuation of the suit in which the judgment was rendered. *United States* v. *Payne,* 147 U.S. 687, 690. (Other citations here omitted)

Green v. *Langnes,* 82 F. 2d 926, 927, (CCA-9).

The writs of scire facias and mandamus are abolished. Relief theretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

81(6b)—*Federal Rules of Civil Procedure.*

Petitioner complaint, as merely a continuation of the suit in which the judgment was rendered, is only for the relief previously afforded by a Writ of Scire Facias, viz: *a new judgment for forthwith recovery of the wrongful withholding* of the proceeds of its prior judgment for the recovery of money from the United States. The prior judgment will sustain the new judgment for $7404.75 as no existing indebtedness of petitioner will appear.

Shortly stated, the *per curiam* overlooks the ministerial administrative payment of money recoveries from the United States is made upon the original judgment, and continued upon the new judgment, which becomes the basis of renewal of payments wrongfully withheld, until full payment of the adjudged recovery is accomplished.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 25, 1957